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No. 85-550

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

SARAH M. SPAETH,
Respondent.

RESPONDENT SARAH M. SPAETH'S BRIEF IN OPPOSITION TO UNION OIL COMPANY OF CALIFORNIA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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This matter comes before the Court on Petition of Union Oil Company of California ("Union Oil") for Writ of Certiorari (the "Petition") served upon Respondent Sarah M. Spaeth ("Spaeth") on October 1, 1985. In opposition thereto, Spaeth sets forth the pertinent facts, and controlling authorities, demonstrating that no reasons exist herein to grant Union Oil's Petition.

QUESTION PRESENTED

As a prefatory matter, and in order to assist the Court in analyzing whether sufficient reasons exist justifying fur-

ther review in this action, it must be emphasized that the "Question Presented" as framed by Union Oil is sophistic and does not set forth an issue that actually arises from the proceedings below. This is so for the reason that such "Question" is expressly founded on the incorrect premises that (a) Union Oil was assessed exemplary damages for a tort consisting merely in "participating in a state administrative proceeding", and that (b) Union Oil's conduct in this regard was "not shown to be engaged in for some purpose other than prevailing on the merits." A review of the factual findings in the various opinions below, which findings are not challenged on appeal by Union Oil,[1] clearly demonstrates that Union Oil's conduct was of materially greater breadth than intimated by its flawed "Question Presented."

The relevant opinions of the trial court and the court of appeals, and the related opinion of the Oklahoma Supreme Court in *Spaeth v. Corporation Commission*,[2] illustrate that Union Oil engaged in a prolonged, and willful, pattern of conduct designed to achieve the fraudulent drainage of Spaeth's mineral interests in derogation of Union Oil's duties as Spaeth's oil and gas lessee. Exemplary damages were assessed against Union Oil for the reason that Union Oil knowingly reaped the financial benefit of the drainage of 7.2 billion cubic feet of gas from under the subject lands, and tortiously breached its obligation to protect Spaeth's interests. Union Oil's conduct in failing to protect and, in fact, intentionally draining Spaeth's interests, and in opposing her efforts to obtain administrative relief in an instance in which Union Oil had a duty to seek such administrative relief on her behalf, was found to be (a) "a willful, fraudulent or grossly negligent breach of the

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[1]Union Oil's Petition at 6, fn. 8.

[2]597 P.2d 320 (Okla. 1979), Appendix C at 13a.

duty owed to [Spaeth]";[3] (b) in "reckless and wanton disregard" of Spaeth's rights and with "malice and evil intent";[4] (c) "particularly egregious";[5] and (d) malicious and "egregious."[6] Thus, Union Oil was found liable not on the basis of a single act — *i.e.*, its conduct in opposing Spaeth in proceedings before the Oklahoma Corporation Commission — but, rather, on the basis of a persistent course of conduct, over a prolonged period, effecting the fraudulent drainage of Spaeth's mineral interest.

At best then, the only real question that Union Oil could arguably present to this Court concerning Union Oil's actions before the Oklahoma Corporation Commission, as it relates to Union Oil's liability for its persistent course of conduct in fraudulently draining Spaeth's interests, is as follows:

> Whether Union Oil can claim immunity, under the First Amendment right to petition, from liability for exemplary damages in an instance in which Union Oil maliciously, fraudulently and with evil intent drained its oil and gas lessor's mineral interests and, in furtherance of the commission of that tort, intentionally failed to satisfy its duty to seek administrative relief on behalf of its lessor and instead, and for fraudulent purposes, resisted its lessor's efforts to obtain such relief.

OPINIONS BELOW

Union Oil correctly advises the Court of the citations to the two published opinions of the United States Court of

[3]District Court Memorandum Opinion, Appendix A at 8a.

[4]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1460 (10th Cir. 1983).

[5]District Court Order on Remand, Appendix B at 12a.

[6]*Spaeth v. Union Oil Co. of California*, 762 F.2d 865, 867 (10th Cir. 1985).

Appeals for the Tenth Circuit in this cause, and further correctly states that the orders and opinions of the district court are unreported. Union Oil incorrectly suggests that the orders and opinion of the district court are included in Union Oil's Petition as Appendices C and D, which Appendices contain only the district court's March 24, 1981 and May 11, 1984 Judgments. The March 17, 1981 Memorandum Opinion of the district court, which sets forth the express findings of fact and conclusions of law of the district court but to which Union Oil makes no reference in its Petition, is set forth in Appendix A hereto. The April 25, 1984 Order of the district court, which contains the district court's express findings on remand but to which Union Oil makes no reference in its Petition, is set forth in Appendix B hereto. The Oklahoma Supreme Court's Opinion in *Spaeth v. Corporation Commission*,[7] which Union Oil incorrectly characterizes as "unreported", is set forth in Appendix C hereto.

CORRECTED STATEMENT OF THE CASE

The subject action was instituted by Spaeth for the recovery of actual and punitive damages for "fraudulent drainage" — *i.e.*, drainage of Spaeth's mineral interest tortiously caused by, and inuring to the benefit of, her lessee, Union Oil, through its operation of, or participation in, adjacent offset wells in which Union Oil had an equal or greater percentage interest.[8] Union Oil's liability to Spaeth, as found by the jury, the district court, and the court of appeals below and as reflected in the opinions below of the district court and court of appeals, was based upon Union Oil's

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[7]597 P.2d 320 (Okla. 1979), Appendix C at 13a.

[8]The nature of Union Oil's duties to Spaeth as her oil and gas lessee under applicable Oklahoma law are discussed in the argument below. *Infra* at 14-15.

persistent, prolonged, egregious course of conduct in dealing with its lessor, Spaeth, and in effecting the substantial drainage of her mineral interest. Because Union Oil's "Statement" ignores both the nature, and the very existence, of the operative facts of this action which demonstrate Union Oil's lengthy course of malicious conduct and gave rise to its liability herein, Spaeth sets forth the following Corrected Statement of the Case pursuant to Rules 22 and 34 of the Supreme Court.

Spaeth's cause of action arises due to the existence of an oil and gas lease with Union Oil as lessee, covering Spaeth's undivided one-half mineral interest in approximately 160 acres in a governmental section of 640 acres described as Section 4, T-17-N, R-11-W, Blaine County, Oklahoma.[9] In 1965, the Oklahoma Corporation Commission (the "Commission") entered an Order creating a single 640-acre drilling and spacing unit, comprising all of said Section 4 (hereinafter the "Spaeth Unit"), for production of gas from the Morrow formation common source of supply underlying said land.[10] Union Oil drilled a well (the "Spaeth Unit well") on the Spaeth Unit, with production commencing in May, 1967.[11] Under the terms of said Order and relevant statutory law. only one well could be drilled in the Spaeth Unit until authority for a second well was sought by a subsequent application and approval obtained from the Commission. The Commission is empowered to grant such approval when such additional well is necessary for the purpose of prevent-

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[9]District Court Memorandum Opinion, Appendix A at 2a; *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[10]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[11]Id.

ing waste or protecting the correlative rights of interested parties.[12]

In addition to owning a one-fourth cost-bearing working interest in the Spaeth Unit, Union Oil owned (1) an approximate one-half cost-bearing working interest in Section 3 (a contiguous 640-acre Morrow Unit east of the Spaeth Unit); (2) a one-fourth cost-bearing working interest in Section 9 (a contiguous 640-acre Morrow Unit south of the Spaeth Unit); and (3) a three-eighths cost-bearing working interest in Section 10 (a contiguous 640-acre Morrow Unit southeast of the Spaeth Unit).[13] The Spaeth Unit and said Sections 3, 9 and 10 each contained one well at the time of trial, with Union Oil being the designated operator of both the Spaeth Unit well and the well located in Section 3.[14]

The expert petroleum engineering and geological testimony offered by Spaeth at trial, and upon which the jury's verdict, the district court's decisions, and the court of appeals' opinions were based, demonstrated that Union Oil had not only permitted but had actually caused the prolonged substantial drainage of Spaeth's interests and financially benefited therefrom. Spaeth's expert petroleum and geological engineer testified that it was evident as early as 1968 that the three offset wells which Union Oil operated or participated in were draining Spaeth's interest.[15]

In 1972, Ralph L. Harvey, an expert geologist and President of Marlin Oil Corporation, became interested in the

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[12]Okla. Stat. tit. 52, § 87.1(d) (Supp. 1984); *Corporation Commission v. Union Oil Co. of California*, 591 P.2d 711, 715 (Okla. 1979).

[13]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[14]Id.

[15]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 102.

potentiality for further petroleum exploration and development in the area in which the four pertinent drilling and spacing units were located. Mr. Harvey consequently performed a geological evaluation of the Spaeth Unit and the three offset units, and, after examining the available geological, pressure, and production data, which data was in the possession of or readily available to Union Oil, sought to purchase from Union Oil the right to conduct further exploration and drilling on the Spaeth Unit.[16] Union Oil declined the offer for "specious reasons."[17] The court of appeals noted that the acceptance of reasoning similar to that offered by Union Oil in declining said offer would result in the granting of a "license to drain gas."[18]

By 1976 the Spaeth Unit well had produced 1 billion cubic feet of natural gas, whereas the offset wells which Union Oil operated or participated in had *each* produced more than ten times that amount, with total cumulative production of 42 billion cubic feet for the three wells.[19] In early 1976, and due to Union Oil's failure to take any action to protect Spaeth's correlative rights and its *refusal to contract with a willing third party* to procure such protection, Spaeth and other parties owning mineral interests in the Spaeth Unit filed an Application with the Commission seeking a modification of the previously mentioned Commission Spacing Order "to permit the drilling of an additional well to protect [Spaeth and others] from drainage and consequent prejudice of their

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[16]*Id.* at 121-23.

[17]District Court Memorandum Opinion, Appendix A at 7a.

[18]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458 (10th Cir. 1983).

[19]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 72-74.

correlative rights."[20] At the hearing on the merits of said Application, Spaeth offered substantial evidence demonstrating that the offsetting wells in which Union Oil owned an interest were draining hydrocarbons from beneath the Spaeth Unit.[21] Union Oil, in contrast, "offered no expert testimony but did cross-examine [Spaeth's] witnesses on all matters" through "lengthy questioning" in opposition to Spaeth's Application.[22] In June, 1976 the Commission denied Spaeth's Application.[23] The Commission's denial of the Application was appealed by Spaeth to the Oklahoma Supreme Court.[24]

In the latter part of 1976, legal counsel for Spaeth transmitted a letter to Union Oil wherein Spaeth placed Union Oil on legal notice that Spaeth was aware that the wells located in Sections 3, 9 and 10 were causing substantial drainage of the natural gas reserves underlying the Spaeth Unit, and that Union Oil was permitting such drainage to occur both by failing to drill another well thereon and by opposing Spaeth's Application seeking the authorization for the drilling of a protection well. The demand letter provided

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[20]*Spaeth v. Corporation Commission*, 597 P.2d 320, 321 (Okla. 1979), Appendix C at 14a. It bears mentioning that the above-quoted description by the Oklahoma Supreme Court of the purpose of Spaeth's Application differs materially from Union Oil's suggestion that Spaeth filed her Application simply because she had "decided that she would benefit if Union were to drill a second well on her property." (Union Oil's Petition at 3).

[21]*Spaeth v. Corporation Commission*, 597 P.2d 320, 321 (Okla. 1979), Appendix C at 16a.

[22]*Id.* at 322, Appendix C at 17a.

[23]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[24]*Spaeth v. Corporation Commission*, 597 P.2d 320 (Okla. 1979), Appendix C at 13a.

Union Oil the legally available option to drill another well to prevent such drainage, or alternatively required Union Oil to release its oil and gas lease within ninety days (in order that another lessee would be free to drill a protection well for Spaeth).[25] Union Oil took no action to satisfy Spaeth's demand.

By 1979, the year in which Spaeth commenced her action below, the Spaeth Unit well had produced 2 billion cubic feet of natural gas, whereas the three offset wells which Union Oil operated or participated in had collectively produced 57 billion cubic feet.[26] Spaeth commenced her action against Union Oil in February, 1979. In May, 1979, a date prior to the trial in this action, the Oklahoma Supreme Court reversed the Commission's denial of Spaeth's Application.[27] In reversing the Commission, the Oklahoma Supreme Court found that "*there is no substantial evidence*" that would support Union Oil's contention that Spaeth's interests were not being drained.[28] Union Oil sought to reverse the Oklahoma Supreme Court's decision by filing a Petition for Rehearing, which Petition was denied.[29] In December, 1979, more than three years after Spaeth demanded that Union Oil act voluntarily to drill a protection well, the Commission authorized the drilling of an additional well in the Spaeth Unit pursuant to the mandate of the Oklahoma Supreme

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[25]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

[26]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 74-75.

[27]*Spaeth v. Corporation Commission*, 597 P.2d 320 (Okla. 1979), Appendix C at 13a.

[28]*Id.* at 322 (emphasis added), Appendix C at 17a.

[29]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1457 (10th Cir. 1983).

Court.[30] On March 9, 1981, Spaeth's action came on for trial before the court and jury. By the time of trial the Spaeth Unit well had produced 2.4 billion cubic feet of natural gas, whereas the three offset wells which Union Oil operated or participated in had collectively produced 67 billion cubic feet.[31]

Subsequent to the entry of the jury's verdict, the district court issued its March 17, 1981 Memorandum Opinion upholding the jury verdict and partially cancelling Union Oil's oil and gas lease. In the Memorandum Opinion, which was neither included in Union Oil's citations to Opinions Below nor set forth in its Appendices, the district court set forth the following express findings of fact and conclusions of law regarding Union Oil's course of conduct with respect to its oil and gas lessor, Spaeth:

(1) That substantial drainage had occurred from Spaeth's land into the adjoining lands in which Union Oil owned oil and gas leasehold interests;

(2) That Union Oil operated one of the draining wells and owned a substantial interest in each of the draining wells;

(3) That Spaeth made demands upon Union Oil to develop her lease and protect her interests from drainage;

(4) That at the time such demands were made Union Oil had superior knowledge of the relevant facts by virtue of its operation of the wells in the Spaeth Unit and an offsetting unit;

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[30]*Id.*

[31]Record, Vol. VII, Transcript of proceedings held on March 9-11, 1981 at 74-75.

(5) That Union Oil unreasonably and unconscionably delayed the drilling of the demanded protection well;

(6) That Union Oil failed to present justifiable reasons for its failure to drill a protection well;

(7) That Union Oil failed in its duty to seek administrative relief on behalf of Spaeth;

(8) That Union Oil vigorously opposed Spaeth's own efforts to obtain administrative relief, and even opposed Spaeth's standing to obtain such relief;

(9) That Union Oil failed to act as a prudent operator;

(10) That Union Oil declined, for specious reasons, offers by a third party to drill a protection well; and

(11) That Union Oil's actions and inactions toward Spaeth constituted a willful, fraudulent or grossly negligent breach of duties owed to Spaeth.[32]

Each of the above findings, made by the district court as the hearer of facts, remain undisturbed on appeal.

Insofar as concerns Union Oil's implicit contention herein that its obstruction of Spaeth's efforts to obtain administrative relief was in good faith and its explicit statement that the court of appeals "utterly failed" to consider whether Union Oil's opposition to Spaeth's efforts was "well founded" or a "sham", it should be noted that the court of appeals expressly found as follows:

(1) That Union Oil had a duty, which it could not ignore, to seek administrative relief on behalf of Spaeth;

(2) That Union Oil's assertion that its conduct before the Commission was based on reliance on the advice of experts was without merit;

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[32]District Court Memorandum Opinion, Appendix A at 3a-8a.

(3) That there is "nothing in the record to sustain Union's claim of good faith reliance on its experts" and that "[t]he reasonable inferences are all to the contrary"; and

(4) That "[t]he evidence shows a reckless and wanton disregard by Union of Spaeth's rights."[33]

The court of appeals further specifically affirmed that Union Oil *intentionally,* and *for fraudulent reasons,* permitted and caused the drainage of 7.2 billion cubic feet of natural gas from beneath the Spaeth Unit through offsetting wells in which Union Oil owned substantial interests.[34] The action was remanded for a remittitur of punitive damages for reasons irrelevant to the "Question Presented" in this appeal.

In its Order on remand, the district court observed that the jury's verdict for exemplary damages was based upon a jury determination that Union Oil "was permitting drainage to occur under circumstances where it *directly benefited financially* by such drainage."[35] The court of appeals affirmed the district court's judgment on remand, observing that Union Oil's conduct in breaching the implied covenant to protect Spaeth against drainage had been malicious.[36]

PROCEEDINGS BELOW

Union Oil's suggestions that it briefed First Amendment or due process issues to the district court and court of

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[33]*Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1458-60 (10th Cir. 1983).

[34]*Id.* at 1459-60.

[35]District Court Order on Remand, Appendix B at 11a (emphasis added).

[36]*Spaeth v. Union Oil Co. of California*, 762 F.2d 865, 867 (10th Cir. 1985).

appeals, and that the court of appeals inexplicably ignored and even failed to address such issues, are simply inaccurate. Suffice it to say that Union Oil cited to the court of appeals only the following two Texas intermediate appellate decisions in support of Union Oil's nebulous statement that "Union cannot be held liable for lawfully pursuing its legal remedies": *Smart v. United States Fidelity & Guaranty Co.*[37] and *Scurlock Oil Co. v. Joffroin.*[38] Neither of said two cases involve the exercise of the First Amendment right to petition, and instead respectively concerned actions to cancel a lien filed against real property and to recover for an alleged trespass.

REASONS FOR DENYING THE WRIT

As is reflected in the Corrected Statement of the Case and in the various opinions below of the district court and court of appeals, the result below turns upon the specific facts of this case in the context of the unique legal relationship between the litigants herein — Union Oil's persistent and tortious course of conduct in violation of duties owed to Spaeth, its oil and gas lessor. Spaeth submits that, in view of the relevant facts and applicable Oklahoma law, the present case simply does not present a meritorious question warranting review by this Court on grant of certiorari.

Proposition I

The Writ Should Be Denied Because Union Oil's Liability Arose Due To Its Malicious Course Of Conduct In Breach Of Duties Owing To Spaeth, Not Due To A Simple Act Of "Participating In A State Administrative Proceeding"

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[37]513 S.W.2d 291 (Tex. Civ. App. 1974).

[38]390 S.W.2d 526 (Tex. Civ. App. 1965). Union Oil's Petition at 6, fn. 7. (The two Texas intermediate appellate decisions constitute the "citations omitted" from Union Oil's footnote number 7).

A. Union Oil's Duties To Spaeth As An Oil And Gas Lessee

Under Oklahoma law the standard oil and gas lease imposes upon the lessee an implied covenant to protect the lessor's share of hydrocarbons underlying a leasehold interest from being drained by wells located on neighboring lands.[39] Additionally, as Spaeth's lessee, Union Oil not only assumed a duty to protect Spaeth's interests from being drained, but also *contractually deprived* Spaeth of the right to act on her own behalf to drill wells herself or to obtain others to do so for the purpose of protecting against such drainage.[40]

In order to effectuate and render meaningful the implied covenant to protect against drainage, further duties are imposed upon the lessee to act as a "prudent operator",[41] and to secure to each lessor such lessor's ratable share of production of hydrocarbon's underlying the lessor's leasehold interest.[42] The lessee also "has the duty to seek an [administrative] exception or variance to remove the obstruction to performance of his obligations under the

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[39]*Texas Consolidated Oils v. Vann*, 258 P.2d 679, 687 (Okla. 1953); *Ramsey Petroleum Corp. v. Davis*, 85 P.2d 427, 429 (Okla. 1938); H. WILLIAMS & C. MEYERS, 5 OIL AND GAS LAW § 821 (1980 ed.)

[40]"If the landowner has granted an oil and gas lease, his right to protect himself is impaired, but he has confered upon his lessee his operating rights for the fundamental purpose of developing the leased premises for their mutual profit and advantage. That fundamental purpose requires the lessee to protect the leased premises from drainage where it is necessary to do so in order to serve their mutual profit and advantage." E. KUNTZ, 5 THE LAW OF OIL AND GAS § 61.1 at 136 (1978 ed.).

[41]*Texas Consolidated Oils v. Vann*, 258 P.2d 679, 687 (Okla. 1953).

[42]*Application of Peppers Refining Co.*, 272 P.2d 416, 424 (Okla. 1954).

lease."[43] Finally, and as obtains in any contractual context, Union Oil had an obligation to deal fairly and in good faith with Spaeth.[44] Union Oil's duties to Spaeth in these respects formed the underlying relationship between the parties.

B. The Fraudulent Drainage Of Spaeth's Interests By Union Oil

As mentioned in the Corrected Statement of the Case, *supra*, Union Oil owned substantial interests in the three draining wells offsetting the Spaeth Unit to the east, southeast, and south. Due partially to the fact that Union Oil operated both the well located on the Spaeth Unit and the offsetting well to the east, Union Oil was in a position of superior knowledge insofar as concerned the relevant facts regarding production from the subject wells.[45] As a purely financial proposition, Union Oil stood to gain from the drainage of Spaeth's interests since Union Oil would derive a greater share of the proceeds attributable to such drained production as a result of its greater ownership in the offsetting, draining wells while concurrently avoiding the costs associated with drilling the necessary protection well on Spaeth's land.

By 1968 it had become evident that the offsetting wells in which Union Oil owned an interest were draining the Spaeth Unit. As was observed by the district court in its Memorandum Opinion, "it inheres in the prudent operator rule that, where as here, the lessee is draining his lessors' land, he will make studies and keep abreast of the available information to determine when, or if, further drilling would

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[43]E. KUNTZ, 5 THE LAW OF OIL AND GAS, § 59.1 at 104 (1978 ed.). See *Sinclair Oil & Gas Co. v. Bishop*, 441 P.2d 436, 437 (Okla. 1967).

[44]See *Producers Pipe and Supply Co. v. James*, 332 P.2d 958, 960 (Okla. 1958).

[45]District Court Memorandum Opinion, Appendix A at 6a.

be profitable and prudent."[46] By 1968, therefore, Union Oil had a duty to take affirmative action and drill a well to prevent further drainage of Spaeth's interests. It was shown at trial that Union Oil refrained from taking this action and instead permitted the offset wells in which it owned substantial interests to continue to drain the Spaeth Unit. When a third party offered to contract with Union Oil in 1972 to drill a well on the Spaeth Unit under an arrangement that would not affect Union Oil's interest in the existing well thereon and that would not require the expenditure of any money by Union Oil, Union Oil declined the offer for "specious reasons." By 1976 the three offsetting, draining wells had collectively produced 42 billion cubic feet of gas compared to the 1 billion cubic feet of gas produced from the Spaeth Unit.

Throughout the period of time from 1968 to the commencement of this action in 1979 "Union had a duty, which it could not ignore, to seek administrative relief" from the Commission for permission to drill a second well to prevent the continuing drainage of Spaeth's interests.[47] Union Oil, however, not only failed to satisfy this duty, but continued to drain Spaeth's interests through the adjacent wells in which it owned substantial interests. Spaeth therefore filed her own Application with the Commission, only to be opposed by Union Oil, necessitating a lengthy appeal that ultimately vindicated Spaeth's position as to the necessity of a second, protection well in the Spaeth Unit. Union Oil also ignored Spaeth's demand for the voluntary drilling of a protection well or, in the alternative, for the release of her oil and gas

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[46]*Id.* at 5a (quoting *Dixon v. Anadarko Production Co.*, 505 P.2d 1394, 1396 (Okla. 1973)).

[47]*Spaeth v. Union Oil Co. of California*, 710 P.2d 1455, 1458 (10th Cir. 1983).

lease. By the time Spaeth instituted the present action in 1979, the three offsetting, draining wells in which Union Oil owned substantial interests had collectively produced 57 billion cubic feet of gas compared to 2 billion cubic feet of gas produced from the Spaeth Unit. By the time of trial in March 1981, the evidence established that such offsetting, draining wells had drained the Spaeth Unit of not less than 7.2 billion cubic feet of gas.[48]

The district court, in its opinion and orders in this action, variously characterized Union Oil as acting "unreasonably and unconscionably", as offering "specious" reasons for its acts and omissions, as acting "in breach and disregard of the duties it owed", as being guilty of "a willful, fraudulent or grossly negligent breach of the duty owed to [Spaeth]",[49] as having "permit[ted] drainage to occur under circumstances where it directly benefitted financially by such drainage" and as being guilty of "particularly egregious" conduct.[50] The court of appeals, in its two opinions below, variously characterized Union Oil as having asserted as a defense that it essentially had a "license to drain gas", as having asserted defenses regarding purported good faith in its actions before the Commission that were without merit, as having acted in "reckless and wanton disregard" of Spaeth's rights,[51] and as "maliciously allowing drainage of [Spaeth's] gas."[52] From these findings of the district court and the court of appeals, it can be seen that exemplary damages were not

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[48]*Id.* at 1459.

[49]District Court Memorandum Opinion, Appendix A at 6a-8a.

[50]District Court Order on Remand, Appendix B at 11a-12a.

[51]*Spaeth v. Union Oil of California*, 710 F.2d 1455, 1458-60 (10th Cir. 1983).

[52]*Spaeth v. Union Oil of California*, 762 F.2d 865, 867 (10th Cir. 1985).

assessed against Union Oil for merely "participating in a state administrative proceeding." Rather, the exemplary damages were assessed against Union Oil as a direct result of Union Oil's fraudulent and malicious conduct in draining Spaeth's interests for a period in excess of ten years. Union Oil's obstructive tactics before the Commission were only an incidental, albeit equally malicious, aspect of the actual tort committed.

The result reached below, based upon Union Oil's breach of its duties as an oil and gas lessee in fraudulently draining the Spaeth Unit, was correct, and such result would properly be reached even in the absence of the particular factual circumstance herein of Union Oil's bad faith opposition to Spaeth in the Commission proceeding. The "Question Presented" as framed by Union Oil in its Petition, by which Union Oil attempts to cast its liability herein as resting solely on its participation in the Commission proceeding, is misleading and simply does not arise under the facts of this case, and an examination of that hypothetical question by the Court would not be appropriate. Moreover, the operative facts of this oil and gas case do not raise a constitutional question meriting consideration by this Court. For these reasons, and the further reasons discussed below, Union Oil's Petition should be denied.

Proposition II

The Writ Should Be Denied Because Union Oil's Opposition To Spaeth's Commission Application Was Actuated By Malice And Fraudulent Intent, And Does Not, In Any Event, Enjoy First Amendment Protection

The various findings by the district court and court of appeals established that Union Oil's overall actions in intentionally draining Spaeth's minerals, and in opposing Spaeth's efforts before the Commission in furtherance of that tortious conduct, were fraudulent, and in reckless and

wanton disregard of Spaeth's rights. Under these circumstances, Union Oil could not prevail in its First Amendment privilege claim even if the Court were to reverse established law associated with First Amendment right to petition privileges, and instead were to apply the stringent "actual malice" standard established under *New York Times Co. v. Sullivan*,[53] pertaining to First Amendment freedom of speech and libelous statements directed at public figures.

This Court has previously acknowledged that "baseless litigation is not immunized by the First Amendment right to petition."[54] Union Oil's conduct in opposing Spaeth before the Commission was found to be without merit and in bad faith and to be unsupported by any substantial evidence. Union Oil's conduct in this regard was further found to be in wanton disregard of Spaeth's rights, malicious, and particularly egregious. As such, and particularly in light of the obviously tortious motive underlying Union Oil's conduct, Union Oil's claim of an exercise of the right to petition is without a "reasonable basis", and, in the absence of an absolute immunity, is "not within the scope of the First Amendment protection."[55] Union Oil's invocation of the First Amendment right to petition "may not be used as the means or the pretext for achieving 'substantive evils'."[56]

Spaeth submits that the subject action is not one in which an exercise of the right to petition plays a material role. As this Court has previously observed, "the Petition

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[53]376 U.S. 254, 279-80 (1964).

[54]*Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).

[55]*Id.*

[56]*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

Clause does not require the State to expand this privilege to an absolute one."[57] Certainly, the court of appeals' opinions herein are not in conflict with other reported decisions of that, or any other, court, particularly in light of this Court's controlling and recent decisions in *Bill Johnson's Restaurants v. NLRB*,[58] and *McDonald v. Smith*.[59] As was true with regard to other inapposite defenses asserted by Union Oil in the proceedings below, the granting of immunity to Union Oil under the First Amendment right to petition would achieve no other purpose than to give Union Oil a "license to drain gas" from its lessor with impunity.

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[57]See *McDonald v. Smith*, 472 U.S. ____, 105 S.Ct. 2787, 2791, 86 L.Ed.2d 384, 390 (1985).

[58]*Supra*, fn. 54.

[59]*Supra*, fn. 57.

CONCLUSION

In view of the foregoing, further review of this action is unwarranted, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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October 31, 1985

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

NO. CIV-79-345-T

SARAH M. SPAETH,

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

FILED
MAR 17 1981
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY_____
DEPUTY

MEMORANDUM OPINION

Plaintiff, Sarah M. Spaeth, commenced this action against the defendant, Union Oil Company of California, seeking actual and punitive damages and equitable relief. Plaintiff alleges that defendant breached implied covenants of an oil and gas lease to protect her mineral estate from drainage and to undertake the prudent development of the leasehold. Plaintiff commenced this action in the District Court in Blaine County, Oklahoma and the action was removed to this Court by the defendant on the basis of diversity of citizenship of the parties. The case was simultaneously tried to a jury and the Court on March 9, 10 and 11, 1981 with the jury determining the question of liability for monetary damages and the Court reserving

the equitable determination of full or partial lease cancellation.[1]

Having heard and considered the evidence, testimony and argument of the respective parties, the Court files this Memorandum Opinion which shall constitute its findings of fact and conclusions of law.

The undisputed facts of this action, as stipulated by the parties hereto, are as follows:

1. Sarah M. Spaeth owned of record the entire mineral interest underlying:

> Lots 1 and 2 and the South Half of the Northeast Quarter of Section 4, Township 17 North, Range 11 West, Blaine County, Oklahoma

until December 29, 1976 and from said date to the present time Sarah M. Spaeth is the owner of an undivided one-half of such minerals.

The mineral interest of Sarah M. Spaeth is subject to that certain oil and gas lease dated October 29, 1956 from Harry J. Gallin to Union Oil Company of California covering the above described land, which lease was recorded December 8, 1956 in Book 38 at page 228. The interest of Sarah M. Spaeth is further subject to that certain contract between Sarah M. Spaeth and Marlin Oil Corporation dated March 17, 1978.

2. By Order No. 61106 of the Oklahoma Corporation Commission, dated December 28, 1965, Section 4-17N-11W, Blaine County, Oklahoma was designated as a single 640-acre drilling and spacing unit for production of gas and gas condensate from the Morrow Sand common source of supply. That under the provisions of said order only one well was permitted upon Section 4 to the Morrow Sand common source of supply.

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[1]The jury returned a verdict in favor of the plaintiff, awarding her actual damages in the sum of $22,807.00 and further assessed punitive damages against the defendant in the sum of $3 million.

3. The only well drilled in and producing from Section 4 is the Union Oil Company of California Schneider No. 1-4 well located in the approximate center of the Northeast Quarter of the Southwest Quarter of said Section 4 and defendant is the operator of said well.

4. The Schneider No. 1-4 well has continuously produced in paying quantities from the Morrow Sand common source of supply since its completion.

5. Defendant is the operator of the Raines Unit Well in Section 3, Township 17 North, Range 11 West, Blaine County Oklahoma, the east off-set well to the Schneider No. 1-4 well.

6. Defendant owns oil and gas leases covering 160 acres or 1/4 of the working interest in Section 4; approximately 317 acres or 1/2 of the working interest in Section 3; 240 acres or 3/8 of the working interest in Section 10; and 160 acres or 1/4 of the working interest in Section 9.

7. By letter dated October 25, 1976, plaintiff made demand upon defendant either to protect the leased premises from drainage by drilling another well in Section 4 within 90 days from the date of said demand letter or to release the plaintiff's oil and gas lease.

8. On February 13, 1975, Ralph L. Harvey filed an application before the Oklahoma Corporation Commission for an order allowing the drilling of an additional well on Section 4 in Cause CD No. 40701. On May 19, 1975, the Corporation Commission's Trial Examiner entered his report recommending that an order issue denying the application.

9. Plaintiff, joined by other royalty owners in Section 4, petitioned the Corporation Commission on January 29, 1976, for an order authorizing an additional well to be drilled within the unit comprised of Section 4.

10. Defendant challenged plaintiff's standing before the Commission to apply for such an order.

11. Defendant resisted plaintiff and her co-applicants on the merits of the application, taking the position that plaintiff's application should be denied.

12. The Corporation Commission denied plaintiff's application.

13. Plaintiff then appealed to the Oklahoma Supreme Court from the adverse decision of the Corporation Commission.

14. Defendant opposed plaintiff in plaintiff's appeal to the Oklahoma Supreme Court.

15. The Oklahoma Supreme Court reversed the Corporation Commission's order and held that the Commission had erred in denying relief to the plaintiff.

16. Defendant attempted to change the Supreme Court's opinion by filing a petition for rehearing.

17. The Supreme Court of Oklahoma denied defendant's petition for rehearing and issued a mandate to the Oklahoma Corporation Commission ordering the Commission to issue an order consistent with the Supreme Court's judgment.

18. The Commission refused to give the defendant the new hearing it requested and issued an order authorizing the drilling of a second well in the unit comprising Section 4.

19. On December 20, 1979, the Corporation Commission finally entered an order allowing the drilling of a second well.

20. The gas produced from Section 4 was sold to Oklahoma Natural Gas Company for the following prices during the periods set forth, as follows:

a. 19 cents per thousand cubic feet from March 1, 1974 to July 1, 1974.

b. 20.1 cents per thousand cubic feet from July 1, 1974 to July 1, 1979.

c. 21.2 cents per thousand cubic feet from July 1, 1979 to January 1, 1981.

21. The defendant's net worth as of September 30, 1980, as shown by its Form 10-Q filed on November 13, 1980 with the Securities and Exchange Commission is approximately three and one-third billion dollars.

22. Union Oil Company of California is now, and has been since the entry of Order No. 161635 on December 20, 1979, willing to drill a well on Section 4 in the event plaintiff abandons her claim that the lease has terminated.

The determination of plaintiff's right to relief falls within the characterization of fraudulent drainage and, as such, constitutes an exception to the reasonable prudent operator test. In *Dixon v. Anadarko Production Company*, 505 P.2d 1394 (Okla. 1973), the Oklahoma Supreme Court held that a petition need not allege the prudent operator rule when, as in this case, the lessee is allegedly draining his lessor's land and the lessee has superior knowledge of the facts. Further, the Court stated "it inheres in the prudent operator rule that, where as here, the lessee is draining his lessors' land, he will make studies and keep abreast of the available information to determine when, or if, further drilling would be profitable and prudent." 505 P.2d at 1396. The Court cited *Crocker v. Humble Oil & Refining Company*, 419 P.2d 265 (Okla. 1966), for the holding that where a lessee, operating a well on adjacent land, is draining his lessor's land, the lessee need only establish a prima facie case of unreasonable or unconscionable delay in developing an oil and gas lease and the burden of proof is then upon the lessee to excuse his delay.

In *Haken v. Harper Oil Company*, 600 P.2d 1227 (Okla. App. 1979), the Oklahoma Court of Appeals applied the holding of the Supreme Court in *Dixon* that because of superior knowledge, the lessee operating a well on adjacent land has the burden of excusing any significant delay in drilling an offset well. See also *Cock v. El Paso Natural Gas Co.*, 560 F.2d 978 (10th Cir. 1977), which involved the application of New Mexico law but which does provide further persuasive authority for the proposition that the reasonable prudent operator rule does not

apply to a case where a lessee has an interest in adjacent property and refuses to protect its lessor from drainage.

At trial, plaintiff's evidence proved (1) that substantial drainage has occurred from plaintiff's land in Section 4 into the adjoining lands in Sections 3, 9 and 10; (2) that the defendant operates a well in Section 3 and has substantial interests in Sections 3, 9 and 10 into which plaintiff's gas is being drained; (3) that plaintiff made demands upon the defendant to develop her lease and protect it from such drainage; (4) at the time of such demands, defendant had superior knowledge of the facts by virtue of its operation of the wells in Section 4 and in Section 3; (5) that the defendant unreasonably and unconsionably delayed the drilling of such additional well, as demanded, and (6) the defendant failed to excuse its delay. The well demanded of defendant by plaintiff would have been prudent and probably profitable to defendant under the test of *Sunray Mid-Continent Oil Co. v. McDaniel*, post, and was necessary to protect plaintiff's property from the drainage that occurred. As the evidence and stipulated facts establish, the defendant not only failed in its duty to develop plaintiff's lease to protect it from drainage and to apply for permission to do so from the Oklahoma Corporation Commission, but also vigorously opposed plaintiff's own efforts to acquire such permission for the drilling of the additional well, both in the Oklahoma Corporation Commission and in the Oklahoma Supreme Court, in which court she prevailed.

Even applying the reasonable prudent operator test, the evidence shows that Union failed to act as a reasonable prudent operator would have acted under similar circumstances.

In *Sunray Mid-Continent Oil Co. v. McDaniel*, 361 P.2d 683 (Okla. 1961), the Oklahoma Supreme Court stated the reasonable purdent operator rule as follows:

> "*There is no implied obligation on the part of an oil and gas lessee to drill an offset well to a well on adjoining premises, or to drill an additional well on the leased premises after oil or gas has been discovered thereon, save*

> *and except where the drilling of such well would probably, taking all of the existing facts and circumstances into consideration, produce sufficient oil to repay the cost of drilling, equipping, and operating such well, and also to produce a reasonable profit on the entire outlay,* and neither the lessee nor the lessor is the arbiter of whether an offset well should be drilled or the leased premises further developed, *but both are bound by what a reasonably prudent operator would do under similar circumstances*, and under no circumstances will a lessee be required to drill an offset or an additional well when the same would probably not result profitably to him." 361 P.2d at 685 citing *Wilcox v. Ryndak*, 49 P.2d 733 (Okla. 1935).

In consideration of the foregoing factors, the evidence established that Union was obliged to undertake the drilling of the additional well, on its own, as a reasonable prudent operator. It, of course, did not do so, and even declined, for specious reasons, offers by Marlin Oil Corporation, inter alia, to drill the well at Marlin's risk and expense on a farmout basis, with Union reserving an interest in such well, and without affecting Union's interest in the existing Schneider 1-4 well.

Under all such circumstances, and upon the application of either of the foregoing tests, it is the finding of this Court that the described actions and inactions of Union Oil Company were in breach and disregard of the duties it owed to Sarah M. Spaeth to protect her mineral estate from drainage and to fully develop that mineral estate. There remains for determination, however, the question of whether lease cancellation, partial or entire, is an appropriate remedy in this case. In each of the cases cited above, cancellation of an oil and gas lease for breach of an implied covenant was a consideration present. Indeed, the Oklahoma courts have long recognized cancellation of an oil and gas lease as an appropriate remedy for the lessee's breach of the duty to operate the lease diligently and to fully develop the lease. *Strange v. Hicks*, 188 P. 347 (Okla. 1920); *Pelham Petroleum Co. v. North*, 188 P. 1069 (Okla. 1920); *Carder v.*

Blackwell Oil & Gas Co., 201 P. 252 (Okla. 1921); *Wapa Oil & Development Co. v. McBride*, 201 P. 984 (Okla. 1921); *Junction Oil & Gas Co. v. Pratt*, 225 P. 717 (Okla. 1924); *Mistletoe Oil & Gas Co. v. Revelle*, 245 P. 620 (Okla. 1926); *Scott v. Price*, 247 P. 103 (Okla. 1926); *Patsy Oil & Gas Co. v. Baker*, 259 P. 864 (Okla. 1927); *Worrell v. Parsons*, 271 P. 155 (Okla. 1928); *Robinson v. Miracle*, 293 P. 211 (Okla. 1930); *Indian Territory Illuminating Oil Co. v. Haynes Drilling Co.*, 69 P.2d 624 (Okla. 1937), *cert. denied*, 302 U.S. 736 (1937); *Ramsey Petroleum Corp. v. Davis*, 85 P.2d 427 (Okla. 1939); *Magnolia Petroleum Co. v. Rockhold*, 138 P.2d 809 (Okla. 1943); *Morrison v. Johnson*, 185 P.2d 208 (Okla. 1947); *Hudson v. Lyons*, 186 P.2d 309 (Okla. 1947); *Bain v. Portable Drilling Corp.*, 198 P.2d 207 (Okla. 1948); *Shell Oil Co. v. Howell*, 258 P.2d 661 (Okla. 1953); *Shell Oil Co. v. Lee*, 258 P.2d 666 (Okla. 1953); *Coal Oil & Gas Co. v. Styron*, 303 P.2d 965 (Okla. 1956); *Barnes v. Mack Oil Co.*, 376 P.2d 279 (Okla. 1962); *Union Oil Co. of California v. Jackson*, 489 P.2d 1073 (Okla. 1971). While each of these cases indicates cancellation or partial cancellation of a lease is an available remedy, they also expressly hold that the remedy of lease cancellation is only to be used if, under all of the circumstances of a particular case, equity and justice as between the parties demands the application of such relief. See also *Stewart v. Amerada Hess Corp.*, 604 P.2d 884 (Okla. 1979). After giving careful examination of all of the evidence produced by the parties hereto, and the arguments of counsel, it is the determination of the Court that Union Oil Company's actions and inactions toward the plaintiff were either a willful, fraudulent or grossly negligent breach of the duty owed to her. Accordingly, plaintiff is entitled to partial cancellation of such lease. It is the conclusion of the Court that judgment should be entered cancelling the lease in Section 4, as above more fully described, through which Union Oil Company of California is the lessee of the mineral estate owned by Sarah M. Spaeth, save and except that portion of the leasehold which has been properly developed through the Schneider 1-4 well.

Judgment shall enter accordingly.

DATED this 17th day of Marcn, 1981.

/s/ Ralph G. Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

NO. CIV-79-345-T

SARAH M. SPAETH,

Plaintiff,

v.

UNION OIL COMPANY OF CALIFORNIA,

Defendant.

FILED
APR 25 1984
HERBERT T. HOPE
CLERK, U.S. DISTRICT COURT
BY_____
DEPUTY

ORDER

This action is before the Court on remand from the United States Court of Appeals for the Tenth Circuit with directions (1) to enter a judgment for the plaintiff and against the defendant in the amount of $17,542 for actual damages, (2) to set aside and vacate the award of punitive damages, (3) to order a remittitur of a substantial amount in punitive damages with due consideration to the amount needed to punish the defendant in the particular circumstances presented, and (4) if the plaintiff does not accept the remittitur, to hold a jury trial solely on the amount of punitive damages.

As the Court of Appeals noted, when the jury awarded plaintiff punitive damages of three million dollars, it was un-

aware that the Court would later order a partial cancellation of the lease held by the defendant.

Title 23, Okla. Stat. 1981 § 9 provides that punitive damages may be awarded for the sake of example or by way of punishment. The punishment value of an award of punitive damages varies from case to case. *Cities Service Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958); *Jones v. Lennington*, 629 P.2d 805 (Okla. App. 1981). The determination is essentially the amount needed to punish in the circumstances presented.

In the case at hand, the jury determined that an award of punitive damages in the amount of $3 million was justified where the operator of a gas well was permitting drainage to occur under circumstances where it directly benefitted financially by such drainage. This Court cancelled the defendant's right to further develop the leasehold estate held by it in view of the defendant's refusal to engage in such further development.

There is no evidence in the record presented at trial that would permit this Court to determine the value to the defendant of the leasehold estate that was cancelled by the Court. However, it does not appear to this Court that the intention of the Court of Appeals was to offset the punitive damages awarded by the jury on a dollar for dollar basis for the value of the cancelled lease. Rather, it appears as though the Court of Appeals intended for this Court to consider all of the circumstances presented, including the cancellation of the lease, and evaluate the amount of punitive damages that are needed to punish the defendant.

The Court has considered the record presented at trial, including the relative economic positions possessed by the plaintiff and the defendant, the fact that the plaintiff was assisted in this litigation by another, the fact that the defendant asserted as a defense that it essentially held a "license to drain gas," (Opinion of the Circuit Court, p.6), the fact that the defendant offered no explanation prior to the commencement of this action for its failure to fully develop the leasehold estate

held by it, and the fact that the defendant's leasehold estate has been cancelled in part and it is now subject to an award of punitive damages. Upon consideration of these factors, and the record as a whole, this Court finds that the defendant's actions toward the plaintiff were particularly egregious and a substantial award of punitive damages is warranted so as to impress upon the defendant a responsibility to deal fairly with its royalty interest holders. Accordingly, the plaintiff is hereby directed to remit one million dollars of the punitive damages awarded by the jury within fifteen days hereof. If plaintiff so files a remittitur, judgment shall be entered herein for the amount of $17,542 actual damages an $2,000,000 punitive damages in addition to the partial lease cancellation. If such a remittitur is not filed, defendant will be granted a new trial upon the sole issue of punitive damages.

IT IS SO ORDERED this 25th day of April, 1984.

/s/ Ralph G. Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX C

SUPREME COURT OF OKLAHOMA
May 8, 1979
As Corrected July 9, 1979
Rehearing Denied July 20, 1979

No. 49954

SARAH M. SPAETH, WILLIAM KELLY CRONKHITE, WINNIE MAY HOWELL and WALTER SCHNEIDER,

Appellants,

v.

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, UNION OIL COMPANY OF CALIFORNIA, ASHLAND OIL, INC. and GETTY OIL COMPANY,

Appellees.

Mineral owners filed application with Corporation Commission seeking modification of previous order creating drilling and spacing units within common source of supply to permit drilling of additional well and protect owners from drainage and consequent prejudice of their correlative rights. The Commission denied the application and the owners appealed. The Supreme Court, Irwin, V. C. J., held that: (1) owners of interest in minerals affected by Commission's order had standing to seek permit to drill additional wells; (2) there was no substantial evidence to support Commission's finding that there had not been substantial change of conditions or substantial change of knowledge of conditions since previous spacing order or that there had been no violation of correlative rights of applicants or of owners of oil and gas rights in and under the unit in question, and (3) Supreme Court did not have authority to make the order which the Commission should have made and could only reverse the Commission's order.

Reversed.

Doolin, J., concurred in part and dissented in part and filed opinion in which Hodges and Barnes, JJ., joined.

Appeal from the Corporation Commission of the State of Oklahoma.

Appellants sought an order which would have permitted the drilling of an additional well on a drilling and spacing unit established by the Corporation Commission. Appellants were denied relief and they appealed.

ORDER REVERSED.

Robert J. Emery, Lytle, Soulé & Emery, Oklahoma City, for appellants.

H.B. Watson, Jr., Watson, McKenzie & Moricoli, Oklahoma City, for appellee Union Oil Co. of California.

C. Harold Thweatt, Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, for appellees Ashland Oil, Inc. and Getty Oil Co.

IRWIN, Vice Chief Justice.

Appellants, Sarah M. Spaeth and various other mineral owners, filed an application with the Corporation Commission for a modification of a previous order creating 640 acre drilling and spacing units within the common source of supply to permit the drilling of an additional well to protect appellants from drainage and consequent prejudice of their correlative rights.[1] Union Oil Company, the well operator in the affected drilling and spacing unit, Ashland Oil Company, Inc., and Getty Oil Company, adjoining operators, intervened as contestants to the application. By Order No. 122,300, Commission denied appellants' requested modification, and they appealed.

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[1]Appellants sought authority to drill an additional well on the drilling and spacing unit and did not seek two allowables, but only a single allowable.

Union first contends that appellants had no standing to request the modification. 52 O.S. 1971, § 87.1(a) authorizes the Commission to enter an order after hearing upon petition of any person owning an interest in minerals embraced within the common source of supply or the right to drill upon lands embraced within the common source of supply. *Texas Oil and Gas Corporation v. Rein*, Okl., 534 P.2d 1277 (1975). Also, 52 O.S. 1971, § 112, provides in part:

> "Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify or supplement the same * * *."

Appellants not only owned an interest in the minerals involved but had been affected by the Comission's order establishing the drilling unit in the common source of supply. We hold appellants had standing to seek the relief requested. Whether they are entitled to any relief is an entirely different matter.

The record discloses a common source of supply for natural gas in the Morrow formation, underlying part of Township 17, Range 11 West, Blaine County, Oklahoma. By Order No. 59,245, entered June 17, 1965, the Commission created 640 acre drilling and spacing units for the Morrow underlying Sections 10 through 15 and 22 through 24 of Township 17. This order was entered on the strength of information obtained from a producing well drilled in Section 14. By Order No. 61,106, entered December 28, 1965, the Commission extended Order No. 59,245 to include Sections 1 through 5, 8, 9, 16, 17, 20, 21, and 25 through 29 of Township 17. Evidently, Order No. 61,106 was entered on the strength of information obtained from the well in Section 14 as there was no additional development in the area between the June and December order.

In 1966 and 1967 wells were drilled and completed in Sections 3, 4, 9 and 10. Appellants are mineral owners of acreage underlying Section 4. The well in Section 4 is, relatively speaking, a poor well. Testimony on behalf of appellants was that

past production and potential future recovery from adjoining wells east, southeast and south of Section 4 was and would continue to be many times greater than in Section 4. Appellants' expert believed that porosity factors are such in the common source of supply that these better producing wells have been and will continue to drain gas from under Section 4. That testimony was based on data resulting from the four wells drilled since the last order.

The Commission, in denying appellants' application for modification, made the following findings:

> "6. That the evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions since Order No. 61,106 was entered. * * * The evidence fails to establish the violation of the correlative rights of the applicants or of the owners of the oil and gas rights in and under the unit in question * * *."

A spacing order which has become final may be modified only upon substantial evidence which shows a change in conditions, or a change in knowledge of conditions, arising since the last order. *Phillips Petroleum Co. v. Corporation Commission*, Okl., 461 P.2d 597 (1969). As in other Commission proceedings, the substantial evidence rule controls in appeals involving oil and gas conservation orders. *French v. Champlin Exploration, Inc.*, Okl., 534 P.2d 1302 (1975). This Court had no numerous occasions repeated the definition of "substantial evidence". See *Central Oklahoma Freight Lines v. Corporation Commission*, Okl., 484 P.2d 877 (1971).

Virtually all of the evidence before the Commission was presented by appellants. Based upon data obtained as a result of the wells in Sections 3, 4, 9 and 10, their expert testified that the wells in Sections 3, 9 and 10 were draining Section 4. He said that we now have information involving the reservoir that we did not have when the first orders were entered; and that the changes in knowledge and conditions are substantial changes. This expert was of the opinion that the well in Section

4 was not capable of protecting Section 4 from drainage from the wells in Sections 3, 9 and 10. In order to stop the drainage, he was of the opinion an additional well had to be drilled in Section 4. The expert's opinion was supported by technical data. Appellees offered no expert testimony but did cross-examine appellants' witness on all matters. Notwithstanding this lengthy questioning, appellants' expert testimony remained consistent. We can only conclude there is no substantial evidence that will support Commission's finding that the "evidence introduced did not establish a substantial change of conditions or a substantial change of knowledge of conditions" since the previous spacing order, and its finding that "the evidence fails to establish the violation of the correlative rights of the applicants or of the owners of the oil and gas rights in and under the unit in question." Appellants are entitled to a reversal of the Commission's order.

Appellants suggest that under 52 O.S. 1971, § 112, this Court on appeal, "may itself make the order which the Commission should have made". Section 112 was enacted in 1933 and at that time the Supreme Court had "jurisdiction to review, reverse, correct or annul any action of Commission within the scope of its authority * *." See Oklahoma Constitution, 1931, § 13605. Section 13605 was amended in 1941, and Article 9, § 20 of the Oklahoma Constitution now provides that the Supreme Court "shall enter judgment, either affirming or reversing the order of the Commission appealed from."

Order reversed.

LAVENDER, C.J., and WILLIAMS, HODGES, BARNES, SIMMS, HARGRAVE and OPALA, JJ., concur.

DOOLIN, J., concurs in part, and dissents in part.

DOOLIN, Justice, concurring in part, dissenting in part.

I concur with the majority in its holding appellants have standing to request a modification of the involved order. I also concur there is no substantial evidence to support Commis-

sion's order. But, I cannot let the obiter dicta in the final paragraph of the majority's opinion go unchallenged.

Article 9 § 20 of the Constitution of the State of Oklahoma does not indeed state that the Supreme Court on appeal "shall enter judgment, either affirming or reversing the order of the Commission appealed from." I cannot agree this proviso does not permit this court to include, in our reversal, an order of remand or modification.

The Legislature must function within constitutional limitations, and it is presumed that it acts with a conscious regard thereof. Thus in interpreting Art. 9 § 20, legislative construction is highly persuasive.[1]

Not too long ago 52 O.S. 1971 § 113 was enacted by our Legislature. This statute provides in pertinent part, reference certain appeals from the Corporation Commission:

> " . . .
>
> On such appeal the Supreme Court shall have power to determine the validity, the reasonableness and justice of such order, rule or regulation, and should the Court find from the record that the order, rule, or regulation appealed from is incorrect, unreasonable, unjust or insufficient in any particular *it shall amend, modify, or supplement such order*, rule, or regulation so as to make the same correct, reasonable, just or sufficient, or *shall substitute therefor such order*, rule, or regulation as in the Court's opinion is warranted by the record, is reasonable and just, and will effect the purposes and intent of Sections 84–135 of this Title. On such appeals no order, rule or regulation shall be reversed and remanded to the Commission for a new trial thereon or for the taking of additional testimony unless the Court shall find that the evidence introduced before the Commission is insufficient to enable the Court to determine and make a proper order,

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[1] *State v. Grand River Dam Authority*, 195 Okl. 8, 154 P.2d 946 (1945).

> rule, or regulation or that the party appealing did not have lawful notice of the hearing before the Commission, or that the Commission refused to receive competent evidence offered by the party appealing, which, if true, would leave the order, rule, or regulation appealed from without substantial basis in fact.
>
> . . ." (Emphasis supplied).

We must presume our Legislature in enacting this statute was aware of Art. 9 § 20 and construed it to allow the type review by this court provided for in the statute:

Further § 112 is even more explicit:

> Any person affected by any Legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify, or supplement the same. Such application shall be in writing and shall be heard as expeditiously as possible after notice of the hearing thereon shall have been given in the manner provided by Section 14 of this Act. An appeal shall lie to the Supreme Court from any order made by the Commission in any such proceedings or from the refusal of the Commission to make any order petitioned for therein, in the same manner and within the same time in which other appeals are authorized to be taken by the provisions of this Act, and, on any such appeal, the Supreme Court may affirm the order of the Commission, or the Commission's action in refusing to make the order petitioned for, *or may itself make the order which the Commission should have made*, or remand the cause to the Commission with directions to make such order as the Supreme Court may determine should have been made." (Emphasis supplied).

Although Art. 9 § 20 became law after § 112 was enacted, § 112 has not been repealed. Further repeal by implication is not favored and an earlier statute will not be repealed unless there is irreconcilable conflict.[2] In my opinion Art. 9 § 20 was

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[2]*Gulf Oil Co. v. Woodson*, 505 P.2d 484 (Okl. 1972).

not intended to repeal § 112 nor do they conflict. Neither do I believe § 113 violates Art. 9 § 20. The power of this Court to reverse and remand a decision of the Corporation Commission encompasses the right to modify said order and make it that which Commission should have made.

I am authorized to state that Justice Hodges and Justice Barnes concur in the views herein expressed.